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No. 98-83

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES WILSON, GERALDINE WILSON, and RACHEL SNOWDEN,
next friend/mother of VALENCIA SNOWDEN, a minor,

Petitioners,

v.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A.
COLLINS, ERIC E. RUNION, and BRIAN E. ROYNESTAD,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

**BRIEF OF RESPONDENTS MARK A. COLLINS,
ERIC E. RUNION, AND BRIAN E. ROYNESTAD**

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QUESTIONS PRESENTED

1. Does the Fourth Amendment permit law enforcement officers to allow a print reporter and still photographer to be present in a house where a valid arrest warrant is executed, when the media neither observed nor recorded anything that the law enforcement officials executing the warrant did not see and no photographs taken or information gathered at the house have ever been published?

2. Did the law enforcement officers act reasonably in light of established Fourth Amendment principles when, at the time, every court that had considered such conduct had upheld its constitutionality and no clearly settled law exists even today prohibiting the media's presence at the execution of an arrest warrant?

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BRIEF OF RESPONDENTS MARK A. COLLINS,
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STATEMENT OF THE CASE

A. Statement of Facts.

Mark A. Collins, Eric E. Runion, and Brian E. Roynestad are Deputy Sheriffs in the Montgomery County, Maryland Sheriff's Office. In April of 1992, they assisted agents of the United States Marshal's Service in "Operation Gunsmoke," a special apprehension program intended to take into custody dangerous fugitives wanted for drug and violent crimes. J.A. 15.

Dominic Jerome Wilson had been identified as a target of Operation Gunsmoke because of his outstanding charges for theft, robbery, and assault and his history of violations of probation. Deputy Sheriffs Collins and Runion assisted in the gathering of background information regarding Mr. Wilson and obtained criminal warrants for his arrest from the Montgomery County Circuit Court. J.A. 34-42. Deputy Sheriff Roynestad joined the team the morning of the execution of the warrant for Dominic Wilson.

The records for the Montgomery County Sheriff's Office showed Dominic Wilson's address as 909 North Stone Street in Rockville, Maryland. J.A. 48. Dominic Wilson had listed that address on numerous occasions as his address. *Id.* It was also the home of his parents, Charles and Geraldine Wilson. *Id.* In the early morning hours, the officers entered the home and were confronted by Charles and Geraldine Wilson, who had just gotten out of bed. J.A. 49. The officers directed Mr. Wilson to the floor, where he remained until the law enforcement officers determined that he was not Dominic and that Dominic was nowhere in the household, a total detention of approximately ten minutes. J.A. at 50. At that point, the law enforcement officers left.

A reporter and photographer from *The Washington Post* accompanied the Operation Gunsmoke officers during a two-week period in April 1992, including the day the officers attempted to execute the warrant for Dominic Wilson's arrest. Pet. App. 4a. The photographer took several photographs of the scene inside the Wilsons' house, but no photographs were ever published nor were the Wilsons ever identified in the newspaper. There is no allegation that the media conducted an independent search or undertook any activity other than being present where the officers were present and taking photographs that were

never disseminated.

Under the Memorandum of Understanding entered into between the United States Marshal's Service and the Montgomery County Sheriff's Office governing Operation Gunsmoke, the policy and management of the overall operation was the joint responsibility of a steering committee composed of representatives, deputies and agents of the United States Marshal's Service, other federal agencies and those participating from local law enforcement units. J.A. 16. While each entity retained responsibility for the individual conduct of its designated personnel, the steering committee assigned personnel to supervise the operations undertaken under Operation Gunsmoke. J.A. 17. The site supervisor for the Washington, D.C. operation of Operation Gunsmoke was Harry Layne, a supervisory Deputy United States Marshal in the United States Marshal's Office for the Superior Court of the District of Columbia. J.A. 47.

Deputy United States Marshal Layne made the decision to assign the press to ride along on Operation Gunsmoke. Fourth Circuit J.A. 129. He made that decision pursuant to a United States Department of Justice, United States Marshal's Service policy governing media ride-alongs. J.A. 4. As the guide recognized, media ride-alongs are an effective method to promote an accurate picture of law enforcement officials at work. *Id.*

The Deputy Marshals who participated in Operation Gunsmoke were instructed that a waiver of liability had been signed by the press, that the press representatives should be encouraged to wear vests, and that the activities of the press were not restricted as long as they did not impede the operation. Fourth Circuit J.A. 129. According to Deputy United States Marshal Perkins, the Deputy

Marshals' understanding was that the press was to ride along and "pretty much sit back and stay out of our way." Fourth Circuit J.A. 130. There was no specific discussion of whether the media would or would not be allowed to go into a private residence. Fourth Circuit J.A. 131. The press was neither invited onto the property nor told to stay off the property. Fourth Circuit J.A. 132.

In contrast to the written policy of the Marshal's Service, the Montgomery County Sheriff's Office had no established procedures applicable to media ride-alongs. Fourth Circuit J.A. 147. While Montgomery County Sheriff Raymond Kight stated in a deposition in 1994 that he would not ordinarily involve private citizens in the execution of a warrant because of the inherent danger that exists in such tours of duty (Fourth Circuit J.A. 147, 149), the training that office provided its deputies allowed room for discretion, in recognition of the fact that certain situations would permit law enforcement officials to bring a civilian to the scene of an arrest. Fourth Circuit J.A. 150. Accordingly, their policies as of 1992 did not prohibit a Deputy Sheriff from bringing a civilian into a private home. *Id.* Nothing in the Deputy Sheriffs' training or policies directly instructed them that the presence of the media would be improper.

B. Proceedings Below.

The Wilsons filed suit in the United States District Court for the District of Maryland, claiming that the officers violated the Fourth Amendment in three ways: (1) the officers used excessive force in attempting to execute the arrest warrant; (2) the officers lacked probable cause to believe that the fugitive would be found at the Wilsons' home; and (3) the officers permitted representatives of the media to enter the Wilsons' home to observe and

photograph the execution of the arrest warrant. The district court dismissed the allegations of excessive force and lack of probable cause, concluding that the evidence viewed in the light most favorable to the Wilsons demonstrated that the amount of force the officers employed was reasonable and that the officers possessed probable cause to believe that the fugitive they sought resided at and would be found in the Wilsons' home. J.A. 52-56.

The district court rejected the officers' assertions that allowing the reporters to enter the Wilsons' home without their consent did not violate their constitutional rights. Stating that "there is a core constitutional right . . . to be free from unreasonable searches and seizures," J.A. 64, the court held that the officers were not entitled to qualified immunity because, in April 1992, the law was clearly established that it was unconstitutional to permit members of the media to accompany law enforcement officers into a private residence during the execution of an arrest warrant. J.A. 64-67.

The officers appealed the denial of qualified immunity to the United States Court of Appeals for the Fourth Circuit, which reversed. The court of appeals initially held in a 2-1 panel decision that the officers were entitled to qualified immunity because the law did not clearly establish, at the time the arrest warrant was executed, that the Constitution prohibited law enforcement officials from allowing the media to accompany them into a home to observe and photograph the execution of the warrant. Pet. App. 51a. After the court of appeals subsequently voted to rehear the appeal en banc, a majority of the court upheld the officers' qualified immunity defense on the same ground, finding that "the legal landscape when these events occurred" was not "sufficiently developed that it would have been obvious to reasonable officers that the actions at issue were violative

of the Fourth Amendment." Pet. App. 17a. The court did not resolve the underlying question whether the Fourth Amendment is violated by the media's presence in a home during the lawful execution of an arrest warrant. *Id.*

SUMMARY OF ARGUMENT

The governmental action complained of in this case did not result in a violation of the Wilsons' Fourth Amendment rights. While the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *United States v. United States District Court*, 407 U.S. 297, 313 (1972), respondents had the constitutional authority to enter the Wilsons' home because, as the district court found, they had an arrest warrant and probable cause to believe that the subject of the warrant, Dominic Wilson, resided in and was actually at the Wilsons' home. J.A. 52-53. That arrest warrant also vested respondents with the authority to conduct a limited search of the Wilsons' home to effectuate Dominic's arrest. Respondents' execution of the arrest warrant thus did not unlawfully infringe any reasonable expectation of privacy that the Wilsons had, because the Wilsons had no right to prevent government officials from entering their home pursuant to a warrant for the purpose of searching for and arresting their son.

The presence of the media during the execution of the arrest warrant did not violate the Fourth Amendment because it resulted in no additional infringement of the Wilsons' privacy expectations. As the court of appeals held, respondents did not exceed the scope of the warrant in allowing two reporters into the Wilsons' home because those reporters did not see or record anything that the officers executing the arrest warrant could not have also observed. Pet. App. 9a. Rather than assert that their privacy was infringed because it was a member of the media

who was in their house, the Wilsons base their Fourth Amendment claim on the physical intrusion that occurred when a warrant was executed for the purpose of arresting their son. The presence of law enforcement officials responsible for executing that warrant did not unconstitutionally violate any privacy rights, however, because those officials had the right to be in the Wilsons' house. Had the two additional individuals in the house been police officers rather than members of the media, that would not be enough to amount to a constitutional violation. The privacy analysis does not change merely because these individuals were not law enforcement personnel.

This is particularly so in a case such as this in which any incremental privacy invasion traceable to the media's presence is outweighed by the public interest that is served by allowing the media to be present during the execution of a warrant. While law enforcement officials may have a difference of opinion on the subject – and did in this case – a reasonable official could conclude that permitting the media to be present during the execution of an arrest or search warrant advances legitimate law enforcement goals. One of these goals is to keep the public adequately informed about the work of law enforcement officers, and is specifically embodied in the media ride-along policy that allowed the press to be present during the search of the Wilsons' house. Subsumed within that objective is the goal of ensuring that officers executing warrants will act within the boundaries of the law. Other valid goals served by allowing the media to witness the execution of a warrant include minimizing the risk that homeowners or other individuals who are present during the warrant's execution will become violent, and deterring others from engaging in criminal activity. It was thus appropriate for respondents to decide, in light of these legitimate law enforcement goals,

that the media could be present during the warrant's execution at the Wilsons' home.

Regardless of this Court's ruling on the merits of the Fourth Amendment issue, respondents are entitled to qualified immunity for their conduct in permitting the media to be present during the execution of the warrant. At the time the officers executed this warrant, there existed no clearly established law – indeed no law whatsoever – to put the officers on notice that allowing the members of the press to observe and record the search might transgress the Fourth Amendment. Rather than cast doubt on the legality of permitting the press on the scene of the execution of a valid warrant, every court that had considered the issue before the events in question here occurred had upheld the constitutionality of that practice. Indeed, it was not until after the conduct at issue took place that the courts of appeals began to analyze the underlying constitutional issue at the level of specificity that now merits this Court's attention. And even with the benefit of hindsight, in 1999, an officer would still be at a loss to understand what constitutional standard applies in this situation, as the courts have yet to agree on the constitutional boundaries for media involvement in law enforcement operations.

Rather than rest their claim on any clearly established law, petitioners instead argue that broad Fourth Amendment principles of privacy of the home would have made it apparent to any reasonable law enforcement official that under no circumstances could members of the media observe the execution of a warrant in a home. Such an approach to liability, however, fails to provide officers the type of fair warning that the Constitution requires before monetary damages may be imposed on an individual officer. This Court's qualified immunity cases accordingly have flatly and repeatedly refused to hold officers liable for

violating the sweeping notions of privacy that petitioners rely upon.

Respondents also acted reasonably in light of existing law and the circumstances in which they found themselves. From the standpoint of the Montgomery County Deputy Sheriffs who were operating under the Marshal's Service guidelines, there was every reason to believe that the conduct they engaged in during the execution of the warrant here was objectively lawful. These officers could reasonably have determined, to the extent they could have discerned a constitutional concern related to the media's presence, that the very minimal, unobtrusive media presence in this case complied with the Fourth Amendment's balancing of privacy and law enforcement concerns, especially when the officers were executing a wholly valid warrant. They acted with objective legal reasonableness, therefore, in permitting the media to accompany them during the execution of the warrant at the Wilsons' home.

ARGUMENT

I. THE MERE PRESENCE OF THE MEDIA DURING THE EXECUTION OF A LAWFUL ARREST WARRANT DOES NOT VIOLATE THE FOURTH AMENDMENT.

This Court has held time and again that "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). While respondents infringed the Wilsons' privacy expectations, that infringement was justified by the arrest warrant for their son, Dominic. The presence of the media during the execution of the arrest warrant did not violate the Fourth

Amendment because it did not result in any significant, additional invasion of privacy interests and those interests are outweighed by legitimate law enforcement objectives that the media's presence advances.

A. The Arrest Warrant Gave Respondents Authority To Invade The Wilsons' Expectation Of Privacy.

Although the "right of a man to retreat into his own home," *Silverman v. United States*, 365 U.S. 505, 511 (1961), is firmly embedded in our nation's jurisprudence and English common law, *see, e.g., Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195 (K.B. 1604), "common-law courts long have held that 'when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter.'" *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (quoting *Semayne's Case*). The privacy right within the home is thus not absolute.

Rather, "a man's home is, *for most purposes*, a place where he expects privacy. . . ." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (emphasis added). More specifically, "[t]he right of the people to be secure in their . . . houses" exists only as to "unreasonable searches and seizures. . . ." U.S. Const. amend. IV. Thus, a search and seizure conducted inside a home without a warrant is not *per se* unreasonable but rather "presumptively unreasonable absent exigent circumstances." *United States v. Karo*, 468 U.S. 705, 715 (1984). Even in cases involving no warrant, therefore, this Court has recognized only that an "individual *normally* expects privacy free of governmental intrusion. . . ." *Id.* at 714 (emphasis added).

The presence of a valid warrant significantly changes the expectation "that society is prepared to recognize as

'reasonable.'" *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring). Warrants "protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents" but rather are "authorized by law" and based on "the detached scrutiny of a neutral magistrate. . . ." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621-22 (1989). In requiring that an objective determination be made before a house may be searched or an individual arrested therein, "the warrant procedure minimizes the danger of needless intrusions of that sort." *Payton v. New York*, 445 U.S. 573, 586 (1980).

A properly executed warrant, therefore, enables law enforcement officials to lawfully "invade" the privacy rights of individuals. In *Payton v. New York*, this Court recognized that, "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U.S. at 603. A warrant for a person's arrest thus may "impinge on both privacy and freedom of movement," *Dalia v. United States*, 441 U.S. 238, 258 (1979), because, in addition to authorizing the arrest of an individual, it "necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." *Steagald v. United States*, 451 U.S. 204, 214 n.7 (1981).

The privacy interests of others will also necessarily be infringed when, as in this case, they share or are found in the home where the police have probable cause to believe the suspect lives. *See Steagald*, 451 U.S. at 230-31 (Rehnquist, J., dissenting) ("If a suspect has been living in a particular dwelling for any significant period, say a few days, it can certainly be considered his 'home' for Fourth

Amendment purposes, even if the premises are owned by a third party and others are living there, and even if the suspect concurrently maintains a residence elsewhere as well.”). Even a search warrant for contraband “implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.” *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (footnote omitted). A warrant for the arrest of a person whose home is occupied by others sanctions the same “substantial invasion of the privacy of the persons who reside[] there.” *Id.* at 701. Those privacy interests must yield to the right of the police not only “to enter and to search anywhere in the house in which [the suspect] might be found,” *Maryland v. Buie*, 494 U.S. 325, 333 (1990), but also, in appropriate circumstances after any arrest has been made, to conduct “a protective sweep, aimed at protecting the arresting officers. . . .” *Id.* at 335.

Respondents had the right to enter the Wilsons’ home to search for Dominic because, as the district court found in this case, “there was a reasonable basis and probable cause . . . to believe that Dominic Wilson resided at the [Wilson’s home].” J.A. 52. The district court observed that Dominic had listed the Wilsons’ address as his own in his probation records. *Id.* In addition, the Montgomery County Sheriff’s Office “had the address” because “[h]e had used it on arrest records in the past.” *Id.* Respondents also had taken into custody Dominic’s brother, who on the morning the arrest warrant was executed “had been driven to the front of the premises and had indicated some time within 30 to 45 minutes prior to the entry that, in fact, Dominic Wilson lived at that address and, in fact, had been there the night before.” J.A. 49. Based on this and the time when the arrest warrant was executed, the district court found “as a matter of law objectively that it was reasonable . . . that

early morning hour to believe that the suspect, Dominic Wilson, was at the address where [respondents] had reason to believe he dwelled.” J.A. 53.¹

Respondents’ execution of the arrest warrant at the Wilsons’ home, therefore, did not violate petitioners’ Fourth Amendment rights. Respondents reasonably believed Dominic was in the Wilsons’ house, and so it was “constitutionally reasonable to require him to open his doors to the officers of the law.” *Payton v. New York*, 445 U.S. at 602-03. Even if petitioners “did harbor some subjective expectation” that the sanctity of their home “would remain private, this expectation is not ‘one that society is prepared to recognize as ‘reasonable.’”” *Smith v. Maryland*, 442 U.S. at 743 (quoting *Katz v. United States*, 389 U.S. at 361). Respondents thus crossed the Wilsons’ threshold with full constitutional authority and violated no expectations of privacy in entering their home and conducting a search for their son.

¹ The existence of a valid warrant for Dominic Wilson’s arrest, and the corresponding authority it contained for respondents to enter the Wilsons’ home, contrasts this case with the English common law cases that petitioners rely upon. Those cases involved general warrants that did not give the defendants the authority either to enter or to conduct a search of the plaintiffs’ homes. See *Wilkes v. Wood*, 98 Eng.Rep. 489 (1763); *Entick v. Carrington*, 95 Eng.Rep. 790 (1765); *Beardmore v. Carrington*, 2 Wils. K.B. 244 (1764). Respondents’ execution of the arrest warrant did not violate any principle of law announced in these cases. On the contrary, the English common law recognized that “a warrant, properly penned, . . . will . . . at all times indemnify the officer, who executes the same ministerially.” 4 William Blackstone, *Commentaries on the Laws of England* 288 (1772).

B. The Media's Presence Did Not Cause Any Appreciable, Additional Intrusion On The Wilsons' Privacy Interests.

While the Wilsons experienced an unwelcome intrusion on the privacy they expected in their home, that intrusion resulted from the lawful entry into the house, not from the presence of the media. Indeed, the media engaged in no conduct resulting in any additional incursion on their privacy. The presence of the media in the home did not violate the Wilsons' privacy rights, therefore, because the Wilsons' expectation of privacy was breached on the authority of a valid and constitutionally proper arrest warrant.

In rejecting the notion that "an individual has a legitimate expectation of privacy in the contents of a previously lawfully searched container," *Illinois v. Andreas*, 463 U.S. 765, 771 (1983), this Court held that not only is it "obvious that the privacy interest in the contents of [such] a container diminishes," *id.*, but that "[n]o protected privacy interest remains in a container once government officers lawfully have opened that container. . . ." *Id.* Thus, "once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost." *Id.* The rationale governing container searches and, more generally, plain view searches applies here.

The Wilsons' privacy rights could not be infringed "[o]nce frustration of the original expectation of privacy [had] occur[red]." *United States v. Jacobsen*, 466 U.S. 109, 117 (1984). As the court of appeals found, the media did not do anything that further frustrated those expectations. The court observed that respondents "did not exceed the scope of the warrant by permitting the reporters . . . into the Wilsons' home" because they did not allow the reporters "to

engage in activities that the officers could not themselves have undertaken consistent with the warrant." Pet. App. 9a. While the Wilsons suggest otherwise, the court of appeals found that "the reporters did not conduct a search of, or intrude into, any areas of the Wilsons' home into which the officers would not have been permitted to go in executing the arrest warrant." Pet. App. 9a. Thus, while petitioners complain that "Mr. Wilson was wearing underpants and Mrs. Wilson was wearing a sheer nightgown throughout the encounter," Br. at 5, the media's observation of this did not result in any incursion on their privacy that differed in any material respect from the invasion that accompanied respondents' entry into the house. On the contrary, respondents and the media saw exactly the same scene.

"The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." *United States v. Jacobsen*, 466 U.S. at 122. The Wilsons' constitutional claim conflates these two distinct concepts. While the Wilsons' sense of violation is understandable, respondents' views and observations did not violate the Wilsons' privacy rights because "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes" or "preclude an officer's observations from a . . . vantage point where he has a right to be and which renders the activities clearly visible." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). See also *Florida v. Riley*, 488 U.S. 445, 450-52 (1989). Indeed, from the officers' perspective from the inside of the Wilsons' house, where respondents clearly had the right to be, "[i]f an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." *Horton v. California*, 496 U.S.

128, 133 (1990). A third party's observation of the same article – or people in this case – does not lead to a different result.

This Court addressed the converse of the situation presented here in *United States v. Jacobsen*, in which federal drug enforcement agents inspected a package containing cocaine after the package had been opened by employees of a private delivery company. Stating that “[t]he Fourth Amendment is implicated only if . . . the expectation of privacy has not already been frustrated,” 466 U.S. at 117, this Court found that the government’s removal and inspection of the package’s contents enabled the agents “to learn nothing that had not previously been learned during the private search.” *Id.* at 120. The subsequent activity thus “infringed no legitimate expectation of privacy and hence was not a ‘search’ within the meaning of the Fourth Amendment.” *Id.* See also *Illinois v. Andreas*, 463 U.S. at 771 (“If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no ‘search’ subject to the Warrant Clause.”); *United States v. Knotts*, 460 U.S. 276, 285 (1983) (holding “there was neither a ‘search’ nor a ‘seizure’ within the contemplation of the Fourth Amendment” when the acts complained of did not “invade any legitimate expectation of privacy”).

That same principle applies in this case. Just as the package owner’s privacy interests in *Jacobsen* were frustrated once the delivery company legitimately opened his package, the Wilsons’ sense of privacy was lost when respondents lawfully required them to open their door and allow entry into the house based on the arrest warrant. To be sure, the Wilsons likely had stronger privacy expectations in their home than those of the owner of a package in the hands of a third party. But this difference does not alter the principle that a privacy interest, once

extinguished by a legitimate intrusion, will not be resurrected to form the basis for a new and different Fourth Amendment violation.

While neither the Wilsons nor the package owner consented to a stranger’s invasion of their privacy, in both cases the conduct that initially caused the privacy invasion was entirely lawful. Given thus, the “visual inspection,” *Jacobsen*, 466 U.S. at 120, by a different party of the same thing or place in which that privacy interest has already been frustrated does not run afoul of the Fourth Amendment, whether that inspection is performed by government officials, as in *Jacobsen*, or by private individuals, as in this case. See also *People v. Boyd*, 474 N.Y.S.2d 661, 665 (N.Y.Sup. 1984) (stating that “having a knowledgeable person present at the execution of the search warrant . . . for immediate confirmatory viewing of seized property . . . constituted no greater intrusion on defendants’ privacy than that which had already been authorized by the issuance of the warrant”).

The fact that those individuals were members of the media does not alter this result. It certainly makes no difference that the media representatives were not police officers, as a number of courts have held that it is proper for law enforcement officials to use private parties in the execution of a warrant for a variety of purposes. See, e.g., *People v. Boyd*, 474 N.Y.S.2d at 666 (“[T]he courts of the five sister states that have had occasion to consider the issue of civilian assistance in search warrant situations have all ruled that the police need not forego the type of aid provided by Dillabough.”) (citing cases); *State v. Ricci*, 472 A.2d 291, 298 (R.I. 1984) (approving the right of the police to use a private citizen to identify stolen jewelry); *State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982) (rejecting defendant’s assertion that a deputy sheriff “violated his

constitutional rights by inviting and permitting non-law enforcement personnel to accompany him on the search"); *State v. Kern*, 914 P.2d 114, 117-18 (Wash.App.1996) (upholding search and retrieval of bank records by bank employees). Whether a person's privacy rights have been violated, therefore, does not turn merely on whether the individuals at the scene of a warrant's execution are private parties rather than police officers. See also *Commonwealth v. Farrar*, 413 A.2d 1094, 1098 (Pa.Sup.1979) ("Since Mrs. Campbell was present in order to help the trooper execute the warrant, her presence in the Farrar house was not an undue invasion of their privacy.").

The Wilsons suggest otherwise, claiming that the presence of the media in their house "intensifies the privacy invasion. . . ." Br. at 31. Petitioners' heightened sense of a privacy invasion, however, was not due to the fact that two representatives of the media were in their house. Indeed, the Wilsons were not even aware of this at the time the arrest warrant was executed. They acknowledged at their depositions that they had "no idea who it was taking pictures," J.A. 45; that they "didn't know that they were members of the press," J.A. 44; and that they did not learn that the reporter and photographer were with the Washington Post until "much, much later." J.A. 43. Rather, as Mrs. Wilson testified, she found it "embarrassing" and "humiliating" to have "all these men in my house." *Id.* It was thus the lawful execution of the warrant that violated Mrs. Wilson's sense of privacy, not the presence of two unidentified members of the media.

The act of taking photographs during the execution of the warrant also did not violate the Wilsons' constitutional rights. As the court of appeals noted, none of the photographs taken at the Wilsons' home has ever been

published.² Pet. App. 5a n.4. No Fourth Amendment violation results from the mere act of memorializing on film scenes that are in plain view of law enforcement officials who have an undisputed right to be in a person's home for the purpose of executing an arrest warrant. Such an act by itself results in no invasion of privacy and thus is no more of a "search" than was the government's inspection of the previously-opened package in *United States v. Jacobsen*. Indeed, the facts that the photographs were never published and that they depicted nothing more than what the officers saw puts this case in stark contrast with *Walter v. United States*, 447 U.S. 649 (1980). In that case, boxes containing obscene films were inadvertently delivered to a private party whose employees opened the boxes but did not view the films. Stating that "[t]he private search merely frustrated" the film owner's expectation of privacy "in part," *id.* at 658, a majority of this Court found that "[t]he projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search." *Id.* at 657 (opinion of Stevens, J.).

No such expansion occurred in this case. Taking but not publishing photographs of people and objects "that came into view during the . . . search would not have constituted

² The outcome of this case does not turn on this fact. Officers who are accompanied by members of the press must expect that some account of their activities may be published. Indeed, such reporting serves legitimate law enforcement objectives, as discussed in the next section. Such reporting, however, need not infringe unnecessarily on privacy interests. The media have multiple editorial means of informing the public of events without publishing either the identities of individuals or compromising photographs of them.

an independent search, because it would have produced no additional invasion of [the homeowner's] privacy interest." *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Stated differently, while the Wilsons' privacy interests had already been invaded by the presence of the police, the photographs did not result, as petitioners suggest, in any "broadcasting to the general public what [the media] observed there." Br. at 19. In short, if the physical "seizure of an object in plain view does not involve an intrusion on privacy," *Horton v. California*, 496 U.S. at 141, then the unintrusive act of simply photographing it cannot create a constitutional violation.

It is thus irrelevant, as petitioners argue, that the warrants made "[n]o mention of media personnel" or the act of taking photographs. Br. at 3; *see also id.* at 19, 25, 31. Even when conduct exceeds the scope of a permissible search and is arguably "unrelated to the justification" for entering a home, "the 'plain view' doctrine can legitimate action beyond that scope." *Arizona v. Hicks*, 480 U.S. at 326. Taking photographs at the Wilsons' house did not constitute a "search" under the Fourth Amendment because the photos were only of scenes that respondents saw and thus did not cause any "additional invasions of [petitioners'] privacy. . . ." *United States v. Jacobsen*, 466 U.S. at 115.

The act of taking photographs also did not constitute a "seizure." "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. at 113 (footnote omitted). As this Court recognized in *Arizona v. Hicks*, the mere recording of serial numbers on stereo equipment observed in plain view did not interfere with any "possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure." 480 U.S. at 324. *See also Texas v. Brown*, 460

U.S. 730, 739 (1983) (plurality) ("[W]hen a police officer has observed an object in 'plain view,' the owner's remaining interests in the object are merely those of possession and ownership."). The act of taking pictures of the Wilsons in front of respondents similarly failed to deprive them of any possessory interests. *See also United States v. Espinoza*, 641 F.2d 153, 167 (4th Cir.) ("Agent Dauwalder did not exceed the scope of the warrant by making photographs of what he saw in plain view and to that extent 'seizing' those views themselves as evidence."), *cert. denied*, 454 U.S. 841 (1981).

C. Legitimate Law Enforcement Goals Advanced By Allowing The Media Inside The Wilsons' Home Outweigh The Minimal Breach Of Privacy That The Media's Mere Presence Caused.

At most, the burden on the Wilsons' privacy caused by the media's presence in their home was *de minimis* compared to the far more fundamental intrusion lawfully resulting from the police entry itself. That minimal breach of privacy did not produce a Fourth Amendment violation. "The general touchstone of reasonableness, which governs Fourth Amendment analysis, governs the method of execution of the warrant." *United States v. Ramirez*, 118 S.Ct. 992, 996 (1998) (citation omitted). The ultimate determination of whether a warrant's execution was reasonable is to be made on a case-by-case basis in a manner that "strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of . . . warrants and the individual privacy interests affected." *Richards v. Wisconsin*, 117 S.Ct. 1416, 1421-22 (1997). The propriety of the warrant's execution in this case thus requires a balancing of the law enforcement objectives that the media facilitated against any incremental privacy intrusion the media's presence may have caused.

The act of striking that balance necessarily means that “[t]he Fourth Amendment’s flexible requirement of reasonableness should not be read to mandate a rigid rule . . . that ignores countervailing law enforcement interests.” *Wilson v. Arkansas*, 514 U.S. at 934. Petitioners nevertheless seek to persuade this Court to announce a rigid rule that the media can never be present at the scene of a warrant’s execution, arguing that, under the rationale of the decision below, respondents “could each just as well justify bringing anyone and everyone inside the home with police. . . .” Br. at 33. This argument suffers in two fundamental ways.

First, it should not lightly be assumed that law enforcement officers executing a warrant will simply extend such an invitation to “any passerby who is on the street as the police arrive.” *Id.* This Court has recognized, of course, “the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant.” *Dalia v. United States*, 441 U.S. at 257. But the exercise of that discretion is not limitless. It is subject to “the general Fourth Amendment protection ‘against unreasonable searches and seizures,’” *id.*, and the courts stand ready to correct abuses by officers.

A police officer who allows a private citizen into a home where a warrant is being executed does so at considerable risk that such an individual will venture beyond the scope of the officer’s search and engage in conduct that runs afoul of “the remaining unfrustrated portion” of the homeowner’s expectation of privacy. *Walter v. United States*, 447 U.S. at 659. If that risk were to materialize, as the court of appeals below had occasion to consider in another case, the officer might be exposed to monetary liability because “the Fourth Amendment prohibits government agents from

allowing a search warrant to be used to facilitate a private individual’s independent search of another’s home for items unrelated to those specified in the warrant.” *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir.1995). See also *Bills v. Aseltine*, 958 F.2d 697, 704-05 (6th Cir.1992) (“The warrant in this case implicitly authorized the police officers to control and secure the premises during their search for a generator. It did not implicitly authorize them to invite a private security officer to tour plaintiff’s home for the purpose of finding General Motors property, thereby discovering evidence that might be of some use in a prosecution unrelated to that involving the Kubota generator.”).

In short, “civilians who act at the behest of the state are treated as police agents, subject to the same controls and restrictions of the Fourth Amendment as the police themselves.” *People v. Boyd*, 474 N.Y.S.2d at 666. See also *State v. Klosterman*, 317 N.W.2d at 803 (stating that “the non-law enforcement personnel must, in effect, be governed by the same rules as law enforcement personnel in considering their conduct during the search”). Given this, the parade of horrors that the Wilsons envision is simply unrealistic, as no reasonable police officer will risk exposure to liability by cavalierly opening the doors of a private home to let in any member of the public at random.

Second, and more important, respondents do not argue that police officers can simply invite anyone into a home where a warrant is being executed. Just as “[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression,” *United States v. Ramirez*, 118 S.Ct. at 996, it would seem to be equally “unreasonable” within the meaning of the Fourth Amendment to permit third parties to

be present during the execution of a valid warrant when they have utterly no connection to law enforcement goals. But individuals should be allowed to accompany the police when their presence advances legitimate law enforcement objectives. For example, courts have held that the Fourth Amendment does not prohibit private citizens from being with the police during the execution of a search warrant for the purpose of identifying stolen property. *See People v. Boyd*, 474 N.Y.S.2d at 666; *State v. Ricci*, 472 A.2d at 298; *State v. Klosterman*, 317 N.W.2d at 803; *Commonwealth v. Farrar*, 413 A.2d at 1098. A marginal increase in the lawful "intrusion" on privacy also would be justified in other situations, such as when supervisory officials attend a warrant execution to ensure compliance by subordinates with departmental policies and procedures.

Undoubtedly, some police officials share the view of the Montgomery County Sheriff, who testified in this case that private individuals ordinarily should not accompany law enforcement officers when executing an arrest or search warrant at a person's home. *See Fourth Circuit J.A. 149*. A reasonable police officer could also conclude, however, as the court of appeals in this case observed, that a "legitimate law enforcement purpose" is served by "permitting media representatives to observe and photographically record the execution of an arrest warrant. . . ." Pet. App. 10a. One such purpose, as set forth in the media ride-along policy that allowed *The Washington Post* reporters to be present in the Wilsons' home, is to keep the public informed about what its law enforcement officials do:

The U.S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public when it accomplishes its designated duties. *Keeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that.*

Media "ride-alongs" are one effective method to promote an accurate picture of Deputy Marshals at work.

J.A. 4 (emphasis added). *See also* Pet. App. 15a ("[T]he media ride-along policy pursuant to which the reporters accompanied the officers indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride alongs advanced that interest.").

Law enforcement officials could also determine, as the court of appeals stated, "that facilitating accurate reporting that improves public oversight of law-enforcement activities is a legitimate law enforcement purpose because it deters crime, as well as improper conduct by law enforcement officers." Pet. App. 10a. The court of appeals also found that such conduct advances the goal of "affording protection to the officers by reducing the possibility that the target of a warrant will resist arrest in the face of recorded evidence of his actions." *Id.*

The decision below does not stand alone on these points. A number of other courts have similarly recognized the propriety of law enforcement officials in bringing members of the media to the site of an arrest or search warrant execution. *See Moncrief v. Hanton*, 10 Med. L. Rep. 1620, 1621-22 (N.D. Ohio 1984); *Prahl v. Brosamle*, 295 N.W.2d 768, 773-75 (Wis.App. 1980); *Higbee v. Times-Advocate*,

Inc., 5 Med. L. Rep. 2372 (S.D.Cal. 1980). See also *United States v. Appelquist*, 145 F.3d 976, 979 (8th Cir.1998); *Stack v. Killian*, 96 F.3d 159, 162-63 (6th Cir.1996); *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106, 1110-11 (Or.App. 1990). These cases confirm that the decision whether to bring the media along falls within the acceptable range of discretion that police officers may reasonably exercise when executing a warrant.

The Wilsons argue that "there was in fact no law enforcement purpose served by the presence of the media in this case," Br. at 30, citing the deposition testimony of respondent Deputy Sheriff Mark Collins, who answered "no" to the question whether he thought that the media were "assisting" respondents "as law enforcement officers in any way." J.A. 119. There are two flaws in this assertion. First, and most obvious, the question whether the media were "assisting" respondents is entirely different from the issue whether their presence in the Wilsons' home advanced legitimate law enforcement purposes. While the media properly did not assist respondents in the actual execution of the warrant – for example, by either asking Charles Wilson whether he was Dominic or searching the house for Dominic – their presence nevertheless directly advanced the legitimate goals that the court of appeals cited.

Second, it is irrelevant what the personal views and beliefs of Deputy Sheriff Collins or any other respondent were on the subject of whether the media were "assisting" them by being in the Wilsons' home. As this Court has stated, "[n]ot only have we never held, outside the context of inventory search or administrative inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." *Whren v. United States*, 517 U.S. 806, 812 (1996). Just as "a lawful postarrest search of

[a] person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches," *id.* at 813 (citing *United States v. Robinson*, 414 U.S. 218, 236 (1973), and *Gustafson v. Florida*, 414 U.S. 260, 266 (1973)), so, too, would the media's advancement of a proper law enforcement purpose, by accompanying officers to the scene of a valid arrest warrant execution, not be made any less legitimate merely because one of those officers thought that the media were not assisting him as a law enforcement official. Petitioners are wrong, therefore, that the presence of the media in their house failed to advance any legitimate law enforcement purpose.

While the Wilsons also complain that there was no express authority in the warrant concerning the right to bring along the media, Br. at 25 and n.13, that does not invalidate respondents' exercise of discretion to allow the media to enter the Wilsons' house. Rejecting the proposition that warrants "must include a specification of the precise manner in which they are to be executed," *Dalia v. United States*, 441 U.S. at 257, this Court has stated that "[i]t would extend the Warrant Clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers." *Id.* at 258.

Indeed, as this Court recognized in a related context, the failure of a warrant to list items that are subsequently found in plain view during the warrant's execution does not invalidate the seizure of those items, even when their discovery is not inadvertent. See *Horton v. California*, 496 U.S. at 138 ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is

confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement.”). On the contrary, this Court found that, in such circumstances, “the scope of the search was not enlarged in the slightest by the omission of any reference to [the items] in the warrant.” *Id.* at 141. The scope of the search at issue in this case was also not expanded by the warrant’s failure to “authorize[] the media’s presence,” Br. at 25 n.13, because, for the reasons set forth previously, respondents did not allow the media to see anything that respondents could not see. Respondents thus properly exercised their discretion and advanced legitimate law enforcement purposes in permitting the media to enter the Wilsons’ home. The exercise of that discretion violated no Fourth Amendment rights.

II. RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY ACTED REASONABLY IN LIGHT OF THE COMPLETE ABSENCE, THEN AND NOW, OF CLEARLY ESTABLISHED LAW PROHIBITING THE MEDIA’S PRESENCE AT THE EXECUTION OF AN ARREST WARRANT.

A. Qualified Immunity Must Be Judged Pragmatically, Considering Both The State Of The Law And The Circumstances Faced By The Officers.

The court of appeals’ decision can also be affirmed for the additional reason that qualified immunity bars the Wilsons’ Fourth Amendment claim. Qualified immunity shields public officials from actions for damages if “a reasonable officer could have believed [his conduct] to be lawful, in light of clearly established law and the information . . . officers possessed.” *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). *See also Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (officials are entitled to

qualified immunity unless the law “clearly proscribed the actions” they took). This protection benefits the public by affording public officials, including police officers, leeway to make reasonable mistakes. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Officials are freed to act vigorously, without the fear that they will be subjected to personal liability even when they “reasonably, but mistakenly” believe their acts are lawful. *Anderson*, 483 U.S. at 641. Early resolution of qualified immunity defenses using an objective standard avoids the diversion of public resources into expensive and time-consuming litigation. *Harlow*, 457 U.S. at 814.

The qualified immunity inquiry begins with a jurisprudential analysis uniquely within the province of judges and lawyers – whether the law was clearly established when the incident occurred – but the resolution of the inquiry ultimately is pragmatic, not academic. “[T]he court should ask whether the agents acted reasonably under settled law, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.” *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). This is particularly true in cases involving law enforcement officers and the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (“The ‘reasonableness’ of [the officer’s conduct] must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” and “proper application of [the reasonableness test] requires careful attention to the facts and circumstances of each particular case.”). The predicament of the individual police officer is no less acute when the officer is required to make judgment calls about the scope of his or her authority to make arrests within the home of a suspected felon: “The policeman on his beat must now make subtle discriminations that perplex

even judges in their chambers.” *Payton v. New York*, 445 U.S. 573, 618-19 (1980) (White, J., dissenting); *see also Steagald v. United States*, 451 U.S. 204, 231 (1981) (Rehnquist, J. dissenting).

It is from this “objective (albeit fact-specific)” application of the law to the particular circumstances, *Anderson*, 483 U.S. at 641, that qualified immunity gains its pragmatic force, giving officers “ample room for mistaken judgments” and shielding “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 343 (1986). On an academic analysis alone, respondents cannot be held personally liable when the specific issue – whether media representatives may be present at searches or seizures inside a dwelling – has sharply divided those appellate judges who have confronted it. But their protection from personal liability is manifest when the inquiry is extended to the pragmatic level. Deputy Sheriffs Collins, Runion, and Roynestad entered the Wilson home fully within the authority of the arrest warrant they held. They cannot reasonably be charged with personal liability for the mere presence of a reporter and photographer, whom they had not invited to be present and who never stepped beyond the bounds of what the officers were authorized to observe.

B. Neither In 1992 Nor Today Is There “Clearly Established” Law That The Media’s Presence When An Arrest Warrant Is Executed In A Home Violated The Fourth Amendment.

A court considering whether a claim overcomes a defense of qualified immunity must first “identify the exact contours of the underlying right said to have been violated.” *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1714 n.5 (1998). If the violation of that right simply does not support

a claim of constitutional deprivation, the court need not consider whether the right was “clearly established.” *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). If the allegations do rise to the level of a constitutional violation, then the court must consider whether the right was so “clearly established” as to give the defendant “fair warning” that his conduct will subject him to personal liability. *United States v. Lanier*, 117 S. Ct. 1219, 1227 (1997).

The specific underlying right alleged to have been violated in this case is an asserted Fourth Amendment right of persons, whose homes have been entered pursuant to a valid warrant, not to be observed and photographed by members of the news media. At the time the officers entered the Wilsons’ home to serve the arrest warrant, no reasonably astute lawyer, based on a thorough search of the case law, could have opined that such a right, with the “exact contours” it later assumed, was clearly established. *County of Sacramento*, 118 S.Ct. at 1714 n.5. Indeed, that issue remains unclear today, as this Court grapples with the arguments of the parties on the underlying Fourth Amendment issue.

In April 1992, at the time the conduct at issue here occurred, not a single circuit court of appeals in the country had considered the question whether law enforcement officers violate the Fourth Amendment when they permit members of the media to observe and record the execution of a search or arrest warrant. The few federal district and state courts that had confronted the question had either found the conduct permissible in all respects, *see Moncrief v. Hanton*, 10 Med. L. Rep. at 1621-22 (no privacy interest protected under the Fourth Amendment was violated when police allowed media to enter home and film arrest); *Higbee v. Times-Advocate*, 5 Med. L. Rep. at 2372-73 (no constitutional violation where press was present during the

execution of a search warrant in a home); *Prahl v. Brosamle*, 295 N.W.2d at 774 (Fourth Amendment not violated because "the filming and television broadcast of a reasonable search and seizure, without more, [do not] result in unreasonableness"), or had found no constitutional violation and at most a common law tort. See *Scott v. Florida*, 559 So.2d 269, 272 (Fla.App. 1990) (filming by television crew did not affect validity of warrant's execution but might be invasion of privacy); *New Jersey v. Harris*, 237 A.2d 887, 889 (N.J.Super.) (presence of newspaper reporter and photographer "may well be a breach of proprieties" but did not render warrant invalid), *cert. denied*, 241 A.2d 13 (N.J.1968).

It was only after 1992, when the conduct under scrutiny here occurred, that the circuit courts of the nation began to consider, and differ on, the existence of the specific right now asserted. Those courts have disagreed on the existence of the asserted Fourth Amendment right itself, and they have split even more sharply over whether any such right could have been considered to have been clearly established. Compare *Wilson* and *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir.1996) (granting qualified immunity because it was not clearly established that "the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant"), *cert. denied*, 117 S.Ct. 1081 (1997) with *Berger v. Hanlon*, 129 F.3d 505 (9th Cir.1997) (denying qualified immunity on basis that CNN broadcast team "transformed" the execution of a warrant into an entertainment event; distinguishing *Wilson*), *cert. granted*, 119 S.Ct. 443 (1998); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir.1994) (denying qualified immunity because "objectives of Fourth Amendment . . . to preserve the right of privacy to the maximum extent" clearly established the

unlawfulness of police allowing media presence), *cert. denied*, 514 U.S. 1062 (1995).

Some courts have taken the position that media involvement in the execution of a search or arrest warrant was self-evidently a Fourth Amendment violation, based not on any case law considering the "exact contours of the right" asserted, but rather by inference from the text of the Fourth Amendment, emanations from the text establishing a zone of privacy in the home, and analogous cases involving the presence of third parties at the execution of warrants. See *Ayeni*, 35 F.3d 680; *Berger*, 129 F.3d 505.

Other courts, however, have found it to be far from self-evident that these general principles established the clear illegality of police allowing media to be present at searches, and instead have determined, as the court of appeals did in this case, that "reasonable jurists can differ" as to whether allowing the presence of the media transgresses general constitutional principles. Pet. App. 14a. See also *Parker*, 93 F.3d at 447 ("Even if we believed that those two cases [*Ayeni* and *Buonocore v. Harris*, 65 F.3d 347 (4th Cir.1995)] were entitled to consideration, they would appear to us to indicate at most the beginning of a trend in the law. Nor do we think it self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant.").

The muddled state of the law on this issue is perhaps best illustrated by *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), which was decided just one month before the conduct giving rise to this action, and is the only case petitioners cite to support their argument that the law on media presence was clearly established. As petitioners acknowledge, *Bills* was "the only federal Court of Appeals

decision in existence prior to April 1992 that addressed the propriety of an intrusion by a private party *not* acting in aid of the law enforcement purpose that entitled law enforcement officials themselves to conduct a search.” Br. at 39-40 (emphasis in original). But in holding that it violated the Fourth Amendment for a police officer to invite a private security officer into a home to assist in a search, the *Bills* court did not establish any broad rule that would apply “with obvious clarity,” *Lanier*, 117 S.Ct. at 1227, to all instances where private persons are present during a search. On the contrary, when *Bills* came before the Sixth Circuit again after remand and after the Second Circuit decided *Ayeni*, the court criticized *Ayeni* for defining the right at issue in overly general terms:

It is hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his conduct under such a vague standard. As with the example of the Due Process Clause cited in *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039, the fact that the Fourth Amendment embodies “well-established” principles will not defeat a claim of qualified immunity. Otherwise, the doctrine is rendered a mere rule of pleading.

Bills v. Aseltine, 52 F.3d 596, 602 (6th Cir.), *cert. denied*, 516 U.S. 865 (1995).

Contrary to petitioners’ argument, the Sixth Circuit did *not* consider the law governing third-party involvement in searches to be clearly established, even in 1995: “The full parameters of the role of private citizens in executing search warrants has not been completely, or clearly, defined. *Clouston* [*United States v. Clouston*, 623 F.2d 485 (6th Cir.1980)] says they may assist, *Ayeni* says they may not

exploit their role for commercial gain, and *Bills I* says that the reasonableness of the officer’s invitation in this particular case must go to a jury, as it did.” *Id.* at 603. See also *Stack v. Killian*, 96 F.3d 159, 162 (6th Cir. 1996) (affirming summary judgment in favor of police who permitted television crew into private home after search, despite the fact that warrant authorized only videotaping and did not expressly permit television crew). In short, the very court that decided the *only* pre-April 1992 case cited by petitioners as establishing the law on media presence at searches did not itself believe that this issue had been settled, even by 1995.

As this Court has recognized, “it is unfair to expect officials to anticipate changes in the law with a prescience that escapes even the most able scholars, lawyers, and judges.” *Anderson v. Creighton*, 483 U.S. at 649 n.2. It would be anomalous, to say the least, to hold law enforcement officers to a *higher* standard of constitutional clairvoyance than lawyers and to subject them to personal liability for failing to discern constitutional principles that only subsequently began to take shape and that remain unresolved today.

C. Broadly Stated Values Found In The Fourth Amendment Or The Common Law Do Not Provide A Sufficient Basis For Holding Officers Liable For Violating Narrowly Defined Rights.

This Court has refused to hold officials liable for “close calls” in the Fourth Amendment context even though broad statements of Fourth Amendment principles arguably established – at least in hindsight – the clear illegality of the conduct. For example, in *United States v. United States District Court*, 407 U.S. 297 (1972), this Court held that broad principles of Fourth Amendment privacy of the home

overrode proffered national security justifications, and thus found that electronic surveillance for domestic security purposes violated the Fourth Amendment. *See, e.g., id.* at 313. Although a unanimous Court found the practice under consideration there to be unreasonable, the Court nevertheless subsequently held, in *Mitchell v. Forsyth*, that the Fourth Amendment's sweeping injunctions did not so "clearly establish" that rule that Attorney General Mitchell should be denied qualified immunity for having authorized the search. Indeed, in *Mitchell*, as here, the divergent rulings of lower courts, and the fact that this Court saw the need to grant certiorari on the merits, weighed in favor of finding that the Fourth Amendment's broad terms did not provide meaningful guidance concerning the legality of a particular law enforcement practice, even to the nation's highest ranking attorney. In language that resonates with this case, the Court observed: "Two Federal District Courts had accepted the Justice Department's position, and although the Sixth Circuit later firmly rejected the notion that the Fourth Amendment countenanced warrantless domestic security wiretapping, this Court found this issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction." 472 U.S. at 534.

Similarly, in *Anderson v. Creighton*, this Court left open the possibility that the officers could be entitled to qualified immunity, despite the clearly established Fourth Amendment prohibition of warrantless searches unless officers have probable cause and there are exigent circumstances. The dissent in *Anderson* would have denied qualified immunity in light of the general prohibition of warrantless searches, arguing that longstanding Fourth Amendment principles of privacy in the home are so well established that further particularization of the right was not needed to alert a reasonable officer to the unlawfulness of

the conduct. 483 U.S. at 667-68 (Stevens, J., dissenting). But in language that applies with equal force to the generalized Fourth Amendment principles that petitioners assert here, the *Anderson* majority cautioned against reliance on general constitutional standards in the "clearly established law" analysis: the "operation of the [clearly established] standard depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. For example, the right to due process is quite clearly established by the Due Process clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* at 639.

This Court has thus refused to hold law enforcement officials liable for damages on the basis of broad Fourth Amendment values. In much the same way as the dissent in *Anderson*, however, petitioners have invoked sweeping principles concerning privacy of the home to argue that the scope of permissible third-party presence at the execution of warrants can be divined with obvious clarity from these precepts. Indeed, petitioners have relied on the very same principles and cases that this Court in *Anderson* implicitly found to be too general to provide meaningful guidance to law enforcement officials. *Compare Anderson*, 483 U.S. at 667-68 (Stevens, J., dissenting) (quoting from *Payton v. New York*, 445 U.S. 573, 598-90 (1980), and *Silverman v. United States*, 365 U.S. at 511) with Pet. Br. at 12-13 (quoting the same language from the same cases).

It would be unfair and inconsistent with both *Mitchell* and *Anderson* to hold the respondents in this case personally liable on the basis of a hindsight determination that broadly worded Fourth Amendment notions clearly marked the precise constitutional limits of Fourth

Amendment reasonableness. Such general Fourth Amendment principles did not provide respondents with fair notice that they might be straying into a constitutional minefield. Last Term, this Court clarified that the requirement of "clearly established law" as a predicate for holding public officials civilly liable is directly analogous to the requirement of "notice" or "fair warning" in the criminal law context. See *United States v. Lanier*, 117 S.Ct. at 1224 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)) (due process requires that accused had "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."). While "general statements of the law are not inherently incapable of giving fair and clear warning," *Lanier*, 117 S.Ct. at 1227, such statements, or broadly analogous case law, must apply with "obvious clarity to the specific conduct in question" in order to constitute "fair warning." *Id.*

Unlike cases where the underlying conduct is inherently blameworthy, see, e.g., *Lanier* (sexual assault of employees in chambers by state court judge), searches and seizures under the Fourth Amendment routinely involve notoriously difficult judgments about whether a particular invasion of "the privacy of the home" is legal or illegal. See *Anderson*, 483 U.S. at 644 ("We have frequently observed, and our many cases on point amply demonstrate, the difficulty determining whether particular searches or seizures comport with the Fourth Amendment."). While some constitutional violations may obviously lie without prior definition in the case law, see, e.g., *Lanier*, 117 S.Ct. at 1227 (quoting *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)) ("There has never been . . . a section 1983 case accusing welfare officials of selling foster children into

slavery; it does not follow that if such a case arose, the officials would be immune from damages liability. . . ."), this Court has developed an elaborate scheme of rules to enforce the Fourth Amendment. Police officers cannot fairly be held liable in damages for failing to anticipate a "new rule" under the Fourth Amendment. See Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583, 627 (1998) (noting that the risk of holding officers liable for "new rules" in the Fourth Amendment context is particularly acute "despite the fault-like language of the constitutional text . . . because much of Fourth Amendment jurisprudence is couched in the form of prophylactic rules which involve most significantly the complex set of judicial holdings that define the contours of the warrant requirement.").

Nor can the common law background to the Fourth Amendment be viewed as the source of definitive guidance to officers on the beat. Even if those principles were clear, "this Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton*, 445 U.S. at 591 n.33. The historical context "sheds light on . . . what the Framers of the Amendment might have thought to be reasonable," *id.* at 591, but the rules applicable to an officer today "have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions." *Id.* at 591 n.33.

Moreover, the historical context is anything but clear. This Court recognized in *Payton* that "the adage that a 'man's house is his castle' . . . was one of the most vital elements of English liberty," *id.* at 596-97, but the application of that aphorism, to even so basic a question as whether warrantless entries of dwellings were permitted on suspicion of a felony, proved fraught with uncertainty. "A

study of the common law on the question . . . reveals a surprising lack of judicial decisions and a deep divergence among scholars." *Id.* at 592. "The most cited evidence of the common-law rule consists of an equivocal dictum in [*Semayne's Case*,]" *id.*, and "[t]he common-law commentators disagreed sharply on the subject." *Id.* at 593. The only "obvious" point this Court could discern was "that the common-law rule on warrantless home searches was not as clear as the rule on arrests in public places." *Id.* at 596. Even so, the Court's decision provoked a strong dissent by three justices, who complained that the decision "virtually ignores these centuries of common-law development, and distorts the historical meaning of the Fourth Amendment." *Id.* at 604 (White, J., dissenting).

One year later, in *Steagald*, the Court revisited the topic in holding that an arrest warrant alone would not justify entry without consent into the house of a party other than the subject of the warrant. Again discussing the diversity of opinion in the common law, the Court concluded that "the common law thus sheds relatively little light on the narrow question before us." 451 U.S. at 220. Although the dissent disagreed with how the question was framed and answered, it agreed that part of the problem derived from trying to answer "narrow question[s]" with broad principles:

The basic error in the Court's treatment of the common law is its reliance on the adage that 'a man's home is his castle.' Though there is undoubtedly early case support for this in the common law, it cannot be accepted as an uncritical statement of black letter law which answers all questions in this area.

* * *

[T]he greater misfortune [of today's ruling] is the increased uncertainty imposed on police officers in the field, committing magistrates, and trial judges, who must confront variations and permutations of this factual situation on a day-to-day basis.

Id. at 229, 231 (Rehnquist, J., dissenting).

Deputy Sheriffs Collins, Runion, and Roynestad were "officers in the field" confronting a permutation of the Fourth Amendment issues on which the case law provided virtually no guidance and certainly no definitive guidance. Absent that, these officers cannot be said to have had constitutionally adequate notice that their conduct might subject them to liability. They should not be held accountable in damages should this Court in this case announce, for the first time, the acceptable parameters of media presence in the execution of warrants.

D. The Respondents' Conduct In Allowing Members Of The Media To Observe The Search Was Objectively Legally Reasonable.

Although both the Fourth Amendment and qualified immunity involve assessments of objective reasonableness, the qualified immunity analysis adds a layer to the Fourth Amendment inquiry. Under the Fourth Amendment, the question is whether the conduct was objectively reasonable in the circumstances. *Graham v. Connor*, 490 U.S. at 396. The qualified immunity doctrine asks, in addition, "whether [the officer] could-reasonably have believed that the force used did not violate the Fourth Amendment." *Id.* at 399 n.12 (citing *Anderson v. Creighton*). Qualified immunity thus allows that, even if the police conduct in fact was unreasonable, the officer nevertheless will not suffer personal liability for damages if he or she reasonably could have believed the action was justified.

Even assuming that reasonable officers might perceive a constitutional concern about allowing private persons to be present at the execution of a warrant – and no such clearly defined constitutional parameters existed at the time respondents entered the Wilsons' house – respondents, and particularly the Montgomery County Deputy Sheriffs, acted reasonably, legally, and properly given the information available to them and the circumstances confronting them. As this Court observed in *Anderson*, the fact that a legal principle may be clearly established at a higher level of generality does not mean that the law's applicability is clear in "the circumstances with which [an officer is] confronted." *Anderson*, 483 U.S. at 641. The determination of whether a particular official action is "objectively legally reasonable . . . will often require examination of the information possessed by the searching officers." *Id.* While the officer's "subjective beliefs . . . are irrelevant," the "objective (albeit fact-specific) question whether a reasonable officer could have believed [his conduct] to be lawful" takes account of the specific circumstances surrounding the official action. *Id.*

Particularly from the perspective of respondents Collins, Runion, and Roynestad, the Montgomery County Deputy Sheriffs, the circumstances of the media's presence gave them no reason to suspect that they might be crossing a clearly defined boundary of constitutional law. There is no evidence whatsoever that the Montgomery County officers had any role in inviting the media along for the search, much less into the house. The information possessed by the county officials, based on the uncontroverted facts, was that the deputy sheriffs were operating under the Marshal's Service guidelines, including the media ride-along policy. The Deputy Sheriffs did not participate in the decision to bring along the members of the press, nor did they have any

control, or even knowledge, of whether the press would be entering the home.

Plainly, these officers could reasonably have believed that their duty was not to intervene actively to override the Marshal's Service decision to bring the media along, but instead to fulfill their assigned roles in executing the warrant. Sheriff Kight, despite testifying that he would not personally approve media entry into the home, did not consider his deputies to have violated the law by failing to intervene under the circumstances:

If I--if I were a deputy at that time on the scene? I would envision that as a program that was entirely supervised by the U.S. marshal's service, and I figure they know what they're doing, and they've had to encounter this before, and they -- you know, if they didn't violate anybody's constitutional rights by beating them or battering or bruising them; of course I would stop something like that. But a mere trespass, I would figure they had knowledge of what they were doing and knew what they were doing.

Exh. H-5 to Plaintiffs' Opposition to Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment at 27.

The respondents also reasonably could have believed that the existence of a valid warrant diminished the legitimate expectation of privacy such that the media's presence was permissible. While petitioners emphasize the "humiliating circumstances under which the Wilsons were detained and photographed," Br. at 38, the objective legality of the officers' actions in allowing the media into the house does not turn on the nature of the activity that was observed. As set forth earlier, the officers in this case were executing a valid warrant, and the media did nothing in connection

with the search beyond what the officers were authorized to do. *Cf. Ayeni*, 35 F.3d at 690 (search that was filmed by CBS crew was independently illegal because officers initially entered without warrant or exigent circumstances). Reasonable officials could conclude that the mere presence of the media in these circumstances does not result in any additional privacy invasion.

It also would have been "objectively legally reasonable" for respondents to have believed that the media presence was permissible, as long as it was limited, the intrusion minimal, and the operation itself not transformed into an entertainment event. Indeed, even the Ninth Circuit in *Berger* implied that the more limited media role in this case might be reasonable. Distinguishing rather than disagreeing with the Fourth Circuit's decision in this case and the Eighth Circuit's decision in *Parker*, the court observed that "[i]n none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the media that occurred in this case." 129 F.3d at 512. Hence, even if *Berger* had been decided before April 1992, and could have then been deemed to set forth "clearly established law," it is far from evident that the respondents here would have been acting unreasonably, according to the standard announced in that case.

Finally, in view of the unsettled state of the law and the minimal nature of the intrusion in this case, the respondents could reasonably have believed that allowing the media to observe the search furthered legitimate law enforcement purposes. From an objective standpoint, it would be entirely reasonable for respondents to have believed that the media's presence would further the goal, expressly set forth in the Marshal's Service policy, of keeping the public informed of law enforcement activities. Moreover, it would not have been unreasonable to have believed that newspaper

articles describing vigorous law enforcement may serve to deter crime. The presence of media at specific operations such as this one can also document the conduct of officers and minimize the likelihood of a violent confrontation or resistance to arrest. While petitioners seek to sweep these purposes aside, five judges of the *en banc* Fourth Circuit in this case found that they constitute reasonable justifications for the presence of members of the media. Pet. App. 10a, 15a-16a.

Respondents did not violate, therefore, clearly established rights of which a reasonable official would have known. They acted under the full authority of a warrant in making the entry, and none of the circumstances of this case suggests that they reasonably should have anticipated that the limited presence of the media could amount to a constitutional wrong. Their qualified immunity claim should accordingly be sustained.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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